

Submission to Inquiry into Surrogacy

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House of Representatives Standing Committee on Social Policy and Legal Affairs
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To Whom It May Concern:

Thank you for the opportunity to make a submission to the Inquiry into Surrogacy. I am an Assistant Professor of Law at Bond University. I am also close to completing my doctoral studies at Queensland University of Technology. My PhD topic is a harm analysis of commercial surrogacy in Australia. My research and publications on surrogacy primarily address the psychological and social harms that surrogacy is presumed to cause, the regulation of surrogacy in Australia and the need for national reform of that regulatory regime.¹

This submission will address a number of issues relevant to the Terms of Reference including the government's responsibility to balance respect for procreative liberty with protection from harm, permitted payments to surrogates, enforceability of agreements, presumptions as to parentage of children born through surrogacy and the need for a national model of surrogacy regulation.

1. INTRODUCTION

In 1990 the National Bioethics Consultative Committee made the following observation:

One of the reasons that surrogacy arrangements attract attention out of proportion to the frequency of such arrangements is the powerful symbolism evoked. The symbolism of motherhood and the mother/child bond engenders both support for and horror of surrogacy. The images of the longing childless woman with empty arms, the married couple transformed into a 'family' by the presence of a baby, the grieving relinquishing mother, and the woman reduced to her reproductive capacities because of financial need, all overlap each other and conflict with each other. The mother/child bond which stands for the values of caring and nurturance and social connections with the origins of life is sundered and reduced to a cash nexus; the evils of the market impinge on the last haven of human

¹ See Tammy Johnson, 'Queensland's proposed surrogacy legislation: An opportunity for national reform' (2010) 17(4) *Journal of Law and Medicine* 617; Tammy Johnson, 'Through the Looking-Glass: A Proposal for National Reform of Australia's Surrogacy Legislation' in Paula Gerber and Katie O'Bryne (ed), *Surrogacy, Law and Human Rights* (Ashgate Publishing, 2015) 31

security and peace. On the other hand, when the surrogate mother is spoken of as giving a 'gift of love' or 'gift of life' to the commissioning couple, the infant is transformed into a symbol of human love or even human life.²

Australia has struggled with the issue of surrogacy for many years. Since the early 1980s there has been intermittent academic investigation into, and law reform initiatives implemented for, the regulation of surrogacy. However, despite these efforts at reform, Australia's surrogacy legislation is inconsistent, forcing residents in some states and territories to travel interstate or overseas to pursue parenthood. The relevant legislation is often difficult to identify, obscure and virtually impossible to navigate without legal assistance. Queensland, New South Wales and the ACT even have extra-territorial offence provisions in their surrogacy laws, placing even more restrictions on people living in those jurisdictions.

The number of cases heard by Australian courts involving overseas commercial gestational surrogacy is a clear indicator that the prohibition of commercial surrogacy and the extra-territorial offence provisions are an ineffective deterrent for infertile Australians whose last hope for a child is through surrogacy. Given that Australia is a nation of almost 24 million people spread across eight different legal jurisdictions, the time has come to end the fragmentation of our laws and to implement a harmonised legislative regime that provides for the effective regulation of both altruistic and commercial surrogacy agreements.

2. THE GOVERNMENT'S ROLE AND RESPONSIBILITIES IN THE REGULATION OF SURROGACY

Australia is a pluralist liberal society; one that prides itself on providing equal opportunities for its citizens, respect for their liberty and protection against discrimination and harm. As a liberal society, one of the fundamental tenets upon which our laws are built is the respect for individual liberty. Thus, the government cannot legislate to prohibit certain conduct unless it can be shown that such conduct results in harm to others. When considering the government's role and responsibilities in the regulation of surrogacy, it is worth remembering the words of John Stuart Mill, who believed that:

the sole end for which mankind are warranted, individually or collectively in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to *prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.* The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. *Over himself, over his own body and mind, the individual is sovereign.*³

In addition to its responsibility to respect individual liberty and protect against harm, as a State Party to the United Nations Convention on the Rights of the Child (UNCRC),⁴ the Australian government

² National Bioethics Consultative Committee (Australia), 'The National Bioethics Consultative Committee' (Report 1, 1990) 11 [2.5.3].

³ Jeremy Bentham and John Stuart Mill, *The Utilitarians: An Introduction to the Principles of Morals and Legislation* (1961) 484 (emphasis added).

⁴ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

has a responsibility to ensure that this country's laws reflect the rights of children established in that Convention. The government has a legal obligation to take appropriate legislative measures to ensure that children are protected against all forms of discrimination on the basis of, amongst other things, their birth and to ensure that domestic legislation reflects the rights of children to have their birth registered and to know and be cared for by their parents.⁵

3. PERMITTED PAYMENTS TO SURROGATES

Commercial surrogacy is prohibited throughout Australia. The only payments that a surrogate can receive are those for the reimbursement of her actual or reasonable expenses. In a number of states, the legislation places conditions on the making of these payments and permits them to be made only in circumstances where the surrogacy agreement was entered into before conception, the surrogate has relinquished the resulting child to the intended parents and the surrogate has consented to the transfer of the child's parentage.⁶

Despite the long-held views that commercial surrogacy is, as early as 1990 the National Bioethics Consultative Committee recognised that the distinction between altruistic and commercial surrogacy is a very confused one and the two practices are not necessarily mutually exclusive. Surrogates may be motivated by altruism even though they enter into a contract with intended parents and receive payment for their services. Likewise, the absence of a contract and payment does not imply that the surrogate's underlying motivation is altruistic.⁷

Exploitation can occur in many different circumstances but typically it occurs when 'one party to an exchange takes advantage of the other's vulnerability'.⁸ Emotional exploitation between family members and close friends is possible and is potentially more likely to occur in an altruistic surrogacy arrangement than in a commercial one.⁹ The mere fact that the surrogate receives payment does not mean that she is the victim of exploitation nor is she being used merely as a means to the ends of others.¹⁰ As one surrogate asked: 'Why am I exploited if I am paid, but not if I am not paid?'¹¹

As to the appropriate regulatory response to surrogacy, Shalev has identified that 'fears about the potential exploitation of women – well-founded though they may be – do not necessarily lead to the conclusion that surrogacy ... ought to be prohibited.'¹² Prohibiting surrogates from receiving payment for the services that they provide to the intended parents is not the answer. Given the clear overlap between altruistic and commercial surrogacy and the potential for exploitation to occur in either instance, both practices should be similarly regulated. Altruistic surrogacy is now

⁵ Ibid art 2.2, 4, 7.

⁶ See, *Surrogacy Act 2010* (NSW) s 7(1); *Surrogacy Act 2010* (Qld) s 11(1); *Parentage Act 2004* (ACT) s 26(3)(d); *Surrogacy Act 2008* (WA) s 6; *Assisted Reproductive Treatment Act 2008* (Vic) s 44(2).

⁷ National Bioethics Consultative Committee (Australia), above n 2, 9-10 [2.4.4].

⁸ Vida Panitch, 'Global Surrogacy: Exploitation to Empowerment' (2013) 9(3) *Journal of Global Ethics* 329, 331.

⁹ Legislative Council, Standing Committee on Law and Justice, New South Wales Parliament, *Legislation on altruistic surrogacy in NSW* Report 38 (2009) 44 [3.124] quoting Women's Forum Australia, Submission No 22 to Legislative Council Standing Committee on Law and Justice, *Legislation on altruistic surrogacy in NSW*, 26 September 2008, 2.

¹⁰ National Bioethics Consultative Committee (Australia), above n 2, 9-10 [2.4.4].

¹¹ Lori B Andrews, *Between Strangers: Surrogate Mothers, Expectant Fathers, and Brave New Babies* (Harper & Row, 1989) 259.

¹² Carmel Shalev, *Birth Power* (Yale University Press, 1989) 152.

permitted and regulated throughout Australia (with the exception of the Northern Territory which is silent on the issue of surrogacy). It is recommended that the prohibition of commercial surrogacy should be abolished and that new legislative provisions are enacted to allow gestational surrogates to receive compensation for their services.

4. ENFORCEABILITY OF AGREEMENTS

There are a number of countries that recognise the enforceability of gestational surrogacy agreements either through statute or the common law.¹³ It is possible to create a regime that recognises enforceable surrogacy agreements, but such a regime must ensure that sufficient mechanisms are incorporated to protect the parties and the resulting child against harm. It is recommended that all surrogacy legislation contain the following mandatory provisions:

a) MEDICAL OR SOCIAL NEED FOR SURROGACY

There must be a legitimate medical or social need for the parties to pursue surrogacy. There have long been fears, that should commercial surrogacy be permitted in Australia, it would be used as a mechanism for fertile people to have children without having to endure the inconvenience and pain of pregnancy and childbirth.¹⁴ This requirement ensures that surrogacy is used as a legitimate method to address infertility and upholds the public policy that surrogacy for convenience is ethically unacceptable and must not be permitted.

However, restrictions on eligibility based on marital status or sexual preference are likely discriminatory in nature and provisions that limit eligibility on these grounds should be removed from existing legislation.¹⁵ The government must not make moralistic judgments on the parenting ability of people based purely on their marital status or sexual preference. Provisions that prevent single people and same-sex couples from engaging in surrogacy have the effect of creating a legislative assumption that those people are unfit to be parents. Such provisions are overly paternalistic and interfere with people's reproductive liberty.

Whilst there is no recognised right to have children, the freedom to decide whether or not to have a child is nonetheless 'integral to a person's sense of being, in some important sense, the author of their own life plan'.¹⁶ Any interference with this liberty is in effect a violation of a person's bodily integrity as it removes their ability to make an autonomous procreative choice. The decision to have a child is intensely private and the government has no legitimate role in interfering with or

¹³ These countries include South Africa, Georgia, Ukraine and parts of the USA (including California, Illinois, Wisconsin).

¹⁴ See, eg, Stephen Mason, 'Abnormal Conception' (1982) 56 *Australian Law Journal* 347, 354; Chairperson Dame Mary Warnock, 'Report of the Committee of Inquiry into Human Fertilisation and Embryology, ' (Cmnd 9314. HMSO, 1984) 46 [8.17]; Special Committee Queensland Government, *Report of the Special Committee Appointed by the Queensland Government to Enquire into the Laws Relating to Artificial Insemination, In Vitro Fertilization and Other Related Matters* Volumes I and II (1984) 115; Yvonne M Warlen, 'The renting of the womb: An analysis of gestational surrogacy contracts under Missouri contract law' (1994) 62 *University of Missouri-Kansas City Law Review* 583, 584; Ruby L Lee, 'New Trends in Global Outsourcing – Commercial Surrogacy: A Call for Regulation' (2009) 20 *Hastings Women's Law Journal* 275, 282.

¹⁵ See *Parentage Act 2004* (ACT) s 24(c); *Surrogacy Act 2008* (WA) s 19(2); *Family Relationships Act 1975* (SA) s 10HA(2)(b)(iii)(A)-(B).

¹⁶ Emily Jackson, 'Conception and the Irrelevance of the Welfare Principle' (2002) 65 *The Modern Law Review* 176, 177.

scrutinising it. Legislative provisions that have the effect of judging a person's ability to parent based on his or her marital status or sexual preference are incoherent, disingenuous and illegitimate and exceed the government's interest in protecting against harm.¹⁷

b) GESTATIONAL SURROGACY

Only gestational surrogacy should be permitted in Australia. Where medically possible, at least one of the intended parents must be genetically related to the child. Traditional surrogacy increases the risk of psychological harm, especially in instances where the surrogate refuses to relinquish the resulting child to the intended parents.¹⁸ Further, children are more likely to suffer psychological harm, which manifests as confusion as to their identity, attachment disorders, post-traumatic stress disorder and low self-esteem, when their mother is not the woman who gave birth to them.¹⁹

Gestational surrogacy where one or both of the intending parents is genetically related to the resulting child reduces the likelihood of these harms occurring. The surrogate is providing gestational services only and, in handing over the resulting child to the intended parents, she is not relinquishing her own genes. Also, it has been established that where the surrogate is not genetically related to the child there is a lower potential for disputes to arise between the surrogate and the intended parents.²⁰

c) SURROGATE'S AUTONOMY

The reproductive liberty and autonomy of the surrogate must be respected at all times. Section 16 of the *Surrogacy Act (2010)* Qld contains a provision recognising and protecting the autonomy of the surrogate and it is recommended that all surrogacy legislation should contain similar express provisions.

It is widely recognised that the principle of respect for autonomy is one of the policy principles enshrined into Australian law-making. Respect for the surrogate's autonomy has been described in the following terms:

When the ... surrogate signs the contract, she makes an agreement to perform certain specific duties, but ... the couple cannot use the surrogate's body in any way they please; they can only expect that she carry out the specific expectations set forth in the contract.²¹

¹⁷ Ibid.

¹⁸ Pip Trowse, 'Surrogacy: Is it harder to relinquish genes?' (2011) 18 *Journal of Law and Medicine* 614, 632.

¹⁹ See, eg, Caroline Tozzi Reppold and Claudio Simon Hutz, 'Effects of the History of Adoption in the Emotional Adjustment of Adopted Adolescents' (2009) 12(2) *The Spanish Journal of Psychology* 454; Celia Beckett, Jenny Castle, Emma Colvert, Christine Groothues, Amanda Hawkins and Jana Kreppner, 'The experience of adoption (2): the association between communicative openness and self-esteem in adoption' (2008) 32(1) *Adoption & Fostering* 29; Adele Jones, 'Issues Relevant to Therapy with Adoptees' (1997) 34(1) *Psychotherapy: Theory/Research/Practice/Training* 64; Matthew T. Watson, Nelsie M. Stern and Thomas W. Foster, 'Helping Parents and Adoptees Through the Adoption Process Using Group Work' (2012) 20(4) *The Family Journal* 433.

²⁰ Trowse, above n 18, 632.

²¹ Jennifer Damelio and Kelly Sorensen, 'Enhancing autonomy in paid surrogacy' (2008) 22(5) *Bioethics* 269, 272.

It is recommended that any provision in a surrogacy agreement that purports constrain surrogate's autonomy and her right to manage the pregnancy as if she were pregnant with her own genetic child is contrary to public policy and should be void.

d) COUNSELLING AND LEGAL ADVICE

Informed and voluntary consent is crucial in the surrogacy context. The importance of ensuring that all parties to the surrogacy agreement be provided with competent independent counselling as to the psychological and social implications of entering into the agreement and that they receive independent legal advice as to its financial and legal effects is widely acknowledged.

In 2008 the Western Australian Standing Committee identified that '[c]linicians and researchers agree that appropriate screening, preparation and counselling is essential to minimize the risk of harm to the parties involved'.²² Similarly, the Queensland government Legislative Committee recommended that all parties to a surrogacy agreement receive mandatory counselling. The Committee's Report suggested that legislative provisions requiring the parties to undertake counselling would ensure that their liberty was protected whilst at the same time protecting against the risk of harm.²³

The existing legislative provisions requiring the parties to undergo counselling and receive independent legal advice are sufficient in nature but require harmonisation to ensure that counselling is only provided by professionals with relevant expertise as to the effects of ART and, more specifically, surrogacy. Such protective mechanisms work to ensure that the surrogate and the intended parents are provided with information about the psychological, social, financial and legal effects of surrogacy so that they are well placed to make an informed and voluntary decision whether to proceed with the agreement.

e) CRIMINAL HISTORY AND CHILD PROTECTION ORDER CHECKS

It is important for legislators to strike a balance between ensuring that the liberty and privacy of the parties to surrogacy agreements are protected whilst at the same time protecting any children born through surrogacy against harm. The welfare and interests of children born through surrogacy must be given paramount consideration in all circumstances.

In order to assist in the protection of these children from harm, it is recommended that all surrogacy legislation should contain a provision requiring the parties to a surrogacy agreement to undergo nation-wide criminal history and child protection checks before entry into that agreement. The danger of not conducting these checks was brought to light in the 2014 Baby Gammy incident. It was not until the media caught wind of the story of Baby Gammy that the intended father's previous conviction for paedophilia was revealed. Situations like this are avoidable.

Currently, Victoria is the only Australian jurisdiction to incorporate provisions requiring intended parents to undergo criminal history checks. The recommendation for all parties to a surrogacy

²² Standing Committee on Legislation, Parliament of Western Australia, *Report 12 in Relation to the Surrogacy Bill 2007* (2008) 47 [11.26].

²³ Investigation in Altruistic Surrogacy Committee, Queensland Parliament, *Investigation into Altruistic Surrogacy* (2008) 40.

agreement to submit to criminal history and child protection checks creates a proactive legislative mechanism designed to help ensure that the interests of any resulting child are considered paramount and that those interests and the child's welfare are protected against harm.

f) PRE-CONCEPTION APPROVAL OF AGREEMENT

The National Bioethics Consultative Committee recognised that surrogacy agreements made by governmental or governmentally approved non-profit agencies would prevent the creation of undesirable practices market where entrepreneurial agents and baby-brokers play a part.²⁴

It is recommended that only pre-conception written surrogacy agreements be permitted and all such agreements must be assessed by, and granted approval from, an independent review panel comprising appropriately qualified members from the medical, mental health and legal professions.

This independent review panel should be constituted specifically for the purpose of assessing pre-conception surrogacy agreements and must have regard to the welfare and interests of children that may be born through gestational surrogacy. The welfare of such children must be of paramount consideration in all circumstances.

Therefore, before granting its approval to the surrogacy agreement, the review panel must consider and be satisfied that the surrogacy agreement will be consistent with the best interests of the child to be born as a result of that agreement. Additionally, the panel must be satisfied that the agreement is a pre-conception agreement, the surrogate will not be genetically related to the resulting child and the parties have received independent counselling and legal advice and have undergone criminal history and child protection order checks.

5. PRESUMPTIONS AS TO PARENTAGE

Subject to implementation of the other recommendations contained in this submission, it is recommended that children born through gestational surrogacy should, upon birth, be presumed at law to be the children of their intended parents. It is recommended that this presumption would be rebuttable by the surrogate within a specified time period of, say, 28 days after the birth of the resulting child.²⁵

²⁴ National Bioethics Consultative Committee (Australia), above n 2, 10 [2.4.4.8].

²⁵ The 28-day time limit is consistent with the lower limit of the minimum time for an application for parentage orders to be made as prescribed in the current state surrogacy legislation and would give the surrogate sufficient time to make her application while ensuring that the matter is heard without undue delay. Regard should be had to the emotional upheaval that such an application would cause to all of the parties involved and it is imperative that the application be brought without delay to ensure that the best interests of the child remain paramount. For time limits regarding applications for transfer of legal parentage. See, eg, *Surrogacy Act 2010* (Qld) s 21(1), *Surrogacy Act 2010* (NSW) s 16(1), *Parentage Act 2004* (ACT) s 25(3), *Assisted Reproductive Treatment Act 2008* (Vic) s 20(2), *Surrogacy Act 2008* (WA) s 20(3), *Family Relationships Act 1975* (SA) s 10HB(5).

It is acknowledged that this recommendation represents an epic shift in the established presumptions as to parentage.²⁶ This recommendation is not made lightly.

The creation of the legal presumption recommended serves two purposes. Firstly, it provides certainty as to the legal status of all involved in the surrogacy agreement, especially the resulting child, immediately upon that child's birth. Secondly, it obviates the need for applications to be made to the court for parentage to be transferred.²⁷ As recognised above, in all circumstances the best interests of the child must be considered paramount. But, as also stated, the UNCRC establishes a right for children to have their birth registered and to know and be cared for by their parents.

Whilst the Convention does not define the term 'parent', in instances of gestational surrogacy the intended parents should be considered to be the true parents of the resulting child. In many cases, at least one (if not both) of the intended parents is the child's genetic relative. It is the intended parents and not the surrogate who have been the ones to instigate the surrogacy process and irrespective of any genetic connection to the child, they are the ones who intend to be its parents.

The significance of accurate parentage being reflected on a child's birth certificate was discussed in 2011 in *AA v Registrar of Births Deaths and Marriages and BB*,²⁸ where the court had regard to the historical purposes of documenting births. In that case, Walmsley SC noted that the purpose of birth certificates has evolved to 'fulfil the needs of real property and succession in establishing title'.²⁹ Recording the names of the intended parents on the birth certificate in the first instance would, in addition to being in the child's best interests, protect the child's legitimate legal interests.

As technology has evolved, so has the parentage legislation in Australia. First, only natural conception was recognised. Then, with the advent of ART and the use of donated gametes, the legislation changed. It was amended to create, in instances of donated gametes, the presumption of legal parentage in favour of the birth mother and her partner because those were the people that had embarked upon the fertility journey to create a child that they intended to parent.

Now, in the age of gestational surrogacy, the time has come for the law to evolve again to recognise the unique set of circumstances that that practice creates. Amendments are required to create a presumption of parentage in favour of the intended parents; the "true" parents of children born through surrogacy.

²⁶ See, for example, *Status of Children Act 1978* (Qld) ss 19(2), 23(2); *Status of Children Act 1996* (NSW) s 14; *Status of Children Act 1974* (Vic) ss 5, 10E(2); *Family Relationships Act 1975* (SA) ss 8, 10C; *Artificial Conception Act 1985* (WA) s 5; *Parentage Act 2004* (ACT) ss 7, 11(2).

²⁷ There are a number of states in the United States of America that permit the issuance of pre-birth parentage orders including California, Colorado, Connecticut, Kansas, Maine, Alaska, Maryland, Mississippi, North Carolina, Oklahoma, Pennsylvania, Rhode Island, and South Dakota, Massachusetts and New Jersey. See Steven H. Snyder and Mary Patricia Byrn, 'The Use of Prebirth Parentage Orders in Surrogacy Proceedings' (2005) 39(3) *Family Law Quarterly* 633, and Victorian Law Reform Commission: Occasional Paper by John Seymor and Sonia Magri, ART, *Surrogacy and Legal Parentage: A Comparative Legislative Review* (2004). Further, *Gestational Surrogacy Act 2004* (Illinois) s 47/15(b)(1) recognises that the intended parents are the legal parents of the child 'immediately upon the birth of the child'. The effect of this provision is to establish a presumption of parentage in favour of the intended parents in a gestational surrogacy agreement.

²⁸ [2011] NSWDC 100 (17 August 2011).

²⁹ *AA v Registrar of Births Deaths and Marriages and BB* [2011] NSWDC 100 (17 August 2011) [35] quoting *The Laws of Australia* (Lawbook) volume 20.10 at [8].

6. A NATIONAL MODEL

A national model of surrogacy regulation would bridge the current legislative gaps but there may be constitutional hurdles to overcome before that can become a reality because, as noted by Benjamin J in *Lowe & Barry and Anor* the Commonwealth Government lacks the constitutional power to enact national legislation regulating surrogacy.³⁰

Therefore, referral of power by the states or agreement to enact consistent legislation would be essential in order to implement a national surrogacy framework.

7. CONCLUSION

Whilst some of the recommendations made in this submission may be seen as controversial it is now time to enact sweeping reform of Australia's surrogacy laws. A national model is needed to provide a harmonised regime of regulation that respects individual liberty, protects the rights of children and contains mechanisms to safeguard against harm.

Please do not hesitate to contact me should you wish to discuss my submission further. I would be pleased to appear before the Committee in person.

Yours faithfully



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³⁰ [2011] FamCA 625 (5 August 2011) [20].